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RECEIVED

JUN 16 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

June 16, 2003

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th St. S.W. Room
Washington DC 20554

Re: In the Matter of Request for Review of the Decision of the Universal Service Administrator and Alternatively, a Request for Waiver by School Board of Palm Beach County and School District of Palm Beach County, CC Docket Nos. 96-45, 97-21; Billed Entity Number 127754, 471 Application No. 328065, Funding Request Number 882430

Dear Ms. Dortch:

Enclosed for filing are an original and (6) six copies of a Request for Review by the School Board of Palm Beach County and the School District of Palm Beach County in the above-captioned proceeding. Should you have any questions please do not hesitate to contact us.

Very truly yours,

Kemal Hawa

Dana Frix
Kemal Hawa

Enclosures

cc: Jeffrey Carlisle, Esq., FCC/Wireline Competition Bureau w/ encl.
Eric Einhorn, Esq., FCC/Wireline Competition Bureau w/ encl.
Schools and Libraries Division, Universal Service Administrative Company w/ encl.

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Request for Review of the Decision of the Universal Service Administrator and Alternatively, a Request for Waiver by	)	
	)	
School Board of Palm Beach County and School District of Palm Beach County, West Palm Beach, Florida	)	
	)	**CC Docket No. 96-45**
Federal-State Joint Board on Universal Service	)	
	)	
Changes to the Board of Directors of the National Exchange Carrier Association, Inc.	)	**CC Docket No. 97-21**
	)	
To be acted upon by: The Wireline Competition Bureau	)	

REQUEST FOR REVIEW

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June 16, 2003

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SUMMARY

The School Board of Palm Beach County and the Palm Beach County School District (collectively the "School District") submits this Request for Review requesting that the Wireline Competition Bureau reverse the Schools and Libraries Division's ("SLD's") decision denying the Palm Beach County School District's appeal for funding for Funding Year 5 (July 1, 2002-June 30, 2003). Alternatively, the Palm Beach County School District seeks a waiver of any obligation it may have had to submit a Form 470 for Funding Year 5.

The SLD's decision is contrary to law and inequitable. The School District had no legal obligation to file a new Form 470 relative to its long term contract with BellSouth since, under the Commission's rules, the contract is exempt from competitive bidding requirements for the duration of its life. Moreover, the continuation was not a voluntary extension or renewal within the meaning of the Commission's rules. Finally, the addendum exercising the continuation of the contract constituted a minor modification of an agreement which does not give rise to an obligation to file a new Form 470.

Equity also requires that the Wireline Competition Bureau reverse the decision of the SLD. When filing its Form 470 the School District relied on the instructions on the SLD's web-site, pursuant to the SLD's mandate. Perhaps more importantly, the School District's actions were undertaken in reliance on specific guidance it received from SLD staff -- reliance which ultimately proved to be detrimental. The SLD's decision also undermines Congress' universal service goals.

Should the Wireline Competition Bureau find that the School District should have filed a second Form 470 relative to the additional two years in its contract, special circumstances, hardship, equity and overall policy concerns warrant a waiver of any obligation the School District may have had to file this second Form 470.

Before the
Federal Communications Commission
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Request for Review of the Decision of the Universal Service Administrator and Alternatively, a Request for Waiver by	)	
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To be acted upon by: The Wireline Competition Bureau	)	

REQUEST FOR REVIEW

The School Board of Palm Beach County and School District of Palm Beach County, Florida (collectively the "Palm Beach School District" or "School District"), by its counsel, and pursuant to Section 54.719(c) of the Commission's rules, hereby submits this Request for Review of the April 15, 2003, decision of the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC") denying the Palm Beach School District's funding request (the "*Denial Decision*").[1]

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[1] *See* Schools and Libraries Division, Administrator's Decision on Appeal-Funding Year 2002-2003, April 15, 2003 ("*Denial Decision*").

Specifically, the School District requests that the Wireline Competition Bureau (the "Bureau") reverse the SLD's decision denying the School District's appeal for funding for Funding Year 5.[2] In the alternative, the School District requests a waiver of any Commission rule or policy that would have required the Palm Beach School District to submit a second Form 470 relating to its long term contract, as explained more fully below.

The Palm Beach School District has standing to submit this request as the party in interest harmed by the SLD's *Denial Decision*. This Request for Review is timely filed since it was filed with the Bureau within sixty (60) days after issuance of the *Denial Decision*, as required by the *Denial Decision*, and as provided for by Commission order.[3]

I. Introduction

The results of the SLD's review of the Palm Beach School District's request for E-Rate funding are in, and they amount to an irrational subversion of Congressional will. The SLD has denied the residents and school children of Palm Beach County the funding to which they are legitimately entitled, on exceedingly technical grounds. In reaching its decision, the SLD misconstrued applicable law and failed to take into account the fact that the School District's actions were undertaken in reasonable (and ultimately detrimental) reliance on instructions and guidance it received from the SLD itself. The *Denial Decision* must be reversed.

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[2] "Funding Year 5" refers to the period from July 1, 2002 to June 30, 2003.
"Funding Year 4" refers to the period from July 1, 2001 to June 30, 2002.
"Funding Year 3" refers to the period from July 1, 2000 to June 30, 2001.
"Funding Year 2" refers to the period from July 1, 1999 to June 30, 2000.
"Funding Year 1" refers to the period from January 1, 1998 to June 30, 1999.

[3] *See Implementation of Interim Filing Procedures for Filings of Requests for Review, Federal-State Joint Board on Universal Service*, 17 FCC Rcd 339, 340 (2001).

II. The Standard of Review

Consistent with § 54.723(a) of the Commission's rules, the Bureau shall review this request *de novo*,[4] requiring the Bureau to review the facts and applicable law without deference to the SLD's *Denial Decision*. There is no need to find reversible error in the *Denial Decision*.

III. Facts

1. On December 18, 1996 the Palm Beach School District entered into an Agreement (the "Agreement") with BellSouth Telecommunications, Inc. ("BellSouth"). The Agreement provides for an intial term of five years, with an additional two years to be added by mutual agreement.[5] The Agreement became effective on February 18, 1997, with the initial term ending February 17, 2002.

2. On February 18, 1998 (by which point the SLD's E-Rate program had come into existence), the School District submitted Form 470 indicating that the School District was receiving service based on a multi-year contract signed prior to July 10, 1997.

3. The School District filed Form 471s for Funding Years 1 through 4, indicating that the School District was receiving service based on a multi-year contract. The Form 471s indicated the date of expiration for the Agreement as February 17, 2002. The SLD provided funding for Funding Years 1 through 3.

4. On March 16, 2001 the School District received an e-mail from Jeremy Tucker (whose title indicates that he is/was with the "Client Service Bureau/Problem Resolution"

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[4] *See* 47 C.F.R. § 54.723(a) (2002).

[5] *See* Volume and Term Agreement, between BellSouth Telecommunications, Inc. and The School District of Palm Beach County, Article XII, Section H.

division of the SLD).[6] In this e-mail, Mr. Tucker indicated that information was needed from the Palm Beach School District to "complete data entry of your application for E-Rate Discounts." After noting that the SLD's records indicated that the Agreement expired on February 17, 2002, which reduced the funding request to only 8 months of service, Mr. Tucker provided the following three options to the School District:

> "1. Accept only 8 months of funding and and [sic] recalculate Item 23 of Block 5. [Item 23 of FCC Form 471 contains details on the calculation of funding for eligible services.]
>
> 2. If you [the Palm Beach School District] have options to renew on your existing contract you may exercise those options now and in [sic] then fax a signed copy of your contract to me.
>
> 3. If you do not have options on your existing contract and you need to sign a new one then you will have to go through the 28 day bidding process again."[7]

5. The School District was given seven days to respond. Based on the belief that the SLD had authorized these options, *i.e.*, that the SLD offered these options as alternatives under which the School District could continue to receive discounted services under the Agreement without further action, the School District chose to exercise Option 2. When the School District inquired with the SLD whether a letter of intent would satisfy the seven day period, it received an e-mail stating that a letter of intent would satisfy the seven day period to respond.

6. On March 22, 2001, the Palm Beach School District sent to the SLD an executed letter of intent to extend the Agreement to June 30, 2002. This date was chosen to cover the final four months of Funding Year 4 (July 1, 2001-June 30, 2002). Also sent on this date was an

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[6] *See* e-mail correspondence from Jeremy Tucker to Fred Ferguson, March 16, 2002.

[7] *Id.*

updated Form 471, Block 5 changing the contract expiration date to June 30, 2002. This change was accepted by the SLD, as evidenced by funding being approved through June 30, 2002.[8]

7. On November 6, 2001, the School District and BellSouth signed an addendum to exercise the additional two year term in the Agreement, allowing the Agreement to run through June 30, 2004.

8. On January 14, 2002, the Palm Beach School District filed Form 471 for Year 5 (July 1, 2002-June 30, 2003) indicating the expiration date of the Agreement as June 30, 2004.

9. On February 28, 2002, and March 4, 2002, the SLD contacted the Palm Beach School District requesting information about Form 471. No mention was made regarding any need to file a new Form 470.

10. On April 26, 2002, the SLD again contacted the School District and requested, among other items, a copy of the Agreement with the clause allowing the parties to exercise continuing the contract for two years. The SLD staff person stated, at this point, that the Palm Beach School District should have filed a new Form 470 due to the continuation of the Agreement through 2004. The School District replied on the same day with the requested documents along with the e-mail from Jeremy Tucker. In its reply, the Palm Beach School District indicated that it was under the express understanding from the SLD itself that it was not necessary to file Form 470 and asked for confirmation.

11. After the Palm Beach School District attempted on a number of occasions to reach the individual at the SLD with whom it had previously spoken, on May 23, 2002, the SLD

[8] *See* Funding Commitment Decision Letter for Funding Year 4, Schools and Libraries Division, August 7, 2001, Form 471 Application No. 237102.

finally contacted the Palm Beach School District, requesting the addendum to the Agreement, which was promptly sent.

12. On May 31, 2002, an SLD staff person again contacted the School District and requested an e-mail stating that the School District's funding request did not include voice mail and advising that the SLD would be able to approve the Palm Beach School District's application. The e-mail was sent the same day.

13. On June 12, 2002, the SLD sent the Palm Beach School District an e-mail requesting a Form 470, noting the contract expiration date change. The Palm Beach School District responded to this request by sending the e-mail from Jeremy Tucker. The SLD staff person stated that she would check with her boss and let the Palm Beach School District know the following day if the letter was sufficient.

14. On June 18, 2002, having received no response, the Palm Beach School District sent an e-mail to the SLD staff person to whom it had spoken asking if the information provided was satisfactory. The SLD staff person responded affirmatively, stating that she had received the information and had passed it on to a final reviewer. Based on these statements the Palm Beach School District was satisfied that the SLD's concerns regarding the Form 470 issue were resolved and a new Form 470 was not required for Funding Year 5.

15. On September 17, 2002, the Palm Beach School District received a Funding Decision Commitment Letter indicating the SLD had denied funding for Funding Year 5.

16. On October 17, 2002, the Palm Beach School District filed a letter of appeal with the SLD.

17. On May 8, 2003, the Palm Beach School District received the *Denial Decision* from the SLD. This letter was dated April 15, 2003.

IV. Argument

The *Denial Decision* should be reversed on both legal and equitable grounds. The Palm Beach School District complied with all applicable Commission rules governing the competitive bidding process for E-rate subsidies. Even if the Commission were to consider the additional two years of its Agreement an extension to the Agreement, the School District would still have no obligation to file a new Form 470 for those two years. As a matter of equity, it constitutes reversible error to penalize the Palm Beach School District for acting in reasonable (and ultimately detrimental) reliance on specific instructions and guidance it received from the SLD itself, especially given the fact that the SLD has instructed the Palm Beach School District to rely on no source of information other than its instructions.

1. The Palm Beach School District Had No Legal Obligation to File a New Form 470

Contrary to what the SLD suggests in its *Denial Decision*, the Palm Beach School District had no legal obligation to submit a new Form 470 due to its election to continue to take service under the Agreement for the contract's remaining two years. Section 54.511(c) of the Commission's rules explicitly provides that a "contract signed on or before July 10, 1997 is exempt from the competitive bid requirements for the life of the contract" (the "Exemption").[9] The Commission elaborated on this rule in its *Fourth Order on Reconsideration*, in which it concluded "that a contract ***of any duration*** signed on or before July 10, 1997 will be considered

[9] 47 C.F.R. § 54.511(c) (2002).

an existing contract under our rules and therefore exempt from the competitive bid requirements ***for the life of the contract.***"[10]

The Agreement was entered into between the Palm Beach School District and BellSouth on December 18, 1996, and thus falls squarely within the scope of the Exemption. The Agreement is exempt from the competitive bid requirements for the life of the contract. The "life of the contract" is seven years, as the Agreement provides for an initial term of five years, plus an additional two years upon agreement of the parties.[11] Renewal terms are material terms of agreements,[12] and it was the intention of the parties that the Agreement would be extended for its two remaining years on the same terms and conditions agreed to originally.[13] Indeed, the addendum that was executed between the Palm Beach School District and BellSouth consisted of a one line statement that the parties extend the Agreement to the full duration of its life. No other term of the Agreement was mentioned in the addendum.

The *Denial Decision*, therefore, stands in direct contrast to the Commission's rules. It appears to suggest, without setting forth any factual or legal basis for its premise, that the continuation of the Agreement in accordance with its original terms, through June 2004 falls

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[10] *See Federal-State Joint Board on Universal Service, Access Charge Reform Price-Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5445 (1997) ("*Fourth Order*"). (emphasis added)

[11] *See* Volume and Term Agreement between BellSouth Telecommunications, Inc. and The School District of Palm Beach County, Article XII, Section H.

[12] *See Local Motion, Inc. v. Niescher*, 105, F.3d 1278, 1281 (9th Cir. 1997). *See also Demetree v. Commonwealth Trust Co.*, 1996 Del. Ch. LEXIS 112, at 18 (Del. Ch. 1996).

[13] *See Johnson v. Chafee*, 469 F.2d 1216, 1220 (9th Cir. 1972).

outside the scope of the Exemption. That conclusion is tantamount to a conclusion that, irrespective of the intention of the parties, renewal terms are not part of the term of an agreement. Such a decision cannot be reconciled with the plain language of the Commission's rules or contract law, and accordingly must be reversed.[14]

2. The Limitation on the Exemption for Voluntary Extensions is Not Applicable

There is no reasonable construction of Section 54.511(d)(1) of the Commission's rules (which states that the Exemption shall not apply to "voluntary extensions"), that could lead to the conclusion that the limitation applies to the instant situation. At the outset, the Palm Beach School District notes that the rule's validity is questionable at best as a matter of Administrative Procedure,[15] as there was almost no public discussion of the "voluntary extension" issue prior to the rule's adoption.[16] The Recommended Decision of the Federal-State Joint Board on Universal

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[14] Specifically, the *Denial Order* at page 2 states that "Program rules require a new Form 470 to be posted for any contract extension beyond the original contract end date, unless specified in the original Form 470 bidding process." This conclusion is in error in two respects. First, there was no extension "beyond the original contract end date." As noted above, an integral renewal term is a part of a contract, and therefore, the contract's end date was always June 2004 (not 2002). Second it states that a new Form 470 is required beyond the original contact date "*unless specified in the original Form 470 bidding process.*" Since the contract was signed before the existence of the E-rate program, there was no Form 470 bidding process. Therefore it would not matter what date was specified as the end date in the Form 470. In other words, it is immaterial whether the Form 470 specified a June 2002 or June 2004 end date. In addition, since black letter law instructs that a contract's end date is the last date specified in the contract (with all provisions of the contract integrated) it would have been appropriate and accurate for the School District to have included June 2004 as the end date of the contract upon initial filing of the Form 470 in February 1998.

[15] *See Sprint Co. v. Federal Communications Comm'n*, No. 01-1266, slip op. at 8 (DC Cir. Dec. Jan. 21, 2003).

[16] *See Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45, 12 FCC Rcd 8776, 9063 ("*Report and Order*").

Service, which was the underpinning of the rules ultimately adopted by the Commission, did not address the issue of voluntary extensions of existing contracts.[17] There was no legal or factual foundation established for the rule's adoption, and the phrase "voluntary extension" was not defined.[18]

Given that there has been no meaningful discussion of this limitation, it is reasonable to assume that the Commission did not intend, through its adoption, to invalidate each and every extension clause contained in existing agreements. Indeed, in rebuffing attempts to invalidate existing contracts, the Commission has stated that it:

> finds that these proposals would be administratively burdensome, would create uncertainty for those service providers that had previously entered into contracts, and would delay delivery of services to those schools and libraries that took the initiative to enter into such contracts. In addition, we have no reason to believe that the terms of these contracts are unreasonable. Indeed, abrogating these contracts or adopting these other proposals would not necessarily lead to lower pre-discount prices . . . Finally, we note that there is no suggestion in the statute or the legislative history that Congress anticipated abrogation of existing contracts in this context . . . . Furthermore, we conclude that it would not be in the public interest to penalize schools and libraries in states that have aggressively embraced educational technologies and have signed long-term contracts for service . . . .[19]

Not only would invalidation of existing contract clauses be unsupported by Congressional intent and by specific Commission precedent, but Section 54.511(d)(1) also cannot reasonably be applied to the instant situation by its terms. The limitation contained in Section 54.511(d)(1) expressly applies to "voluntary extensions."

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[17] *See Federal-State Joint Board on Universal Service*, Recommended Decision, CC Docket No. 96-45, 12 FCC Rcd. 87, 377-378 (1996).

[18] *See Report and Order* at 9063.

[19] *See id.* at 9063-9064.

Although it is difficult to ascertain what precisely the Commission intended through the use of this language (and there is no discussion in the relevant orders that sheds any light on this issue), under general principles of construction meaning should be given to both words. It follows then that the limitation does not apply to "any" extension but rather only to "voluntary" ones. Extending the Agreement with BellSouth was the only viable option available to the Palm Beach School District. There was nothing "voluntary" about this extension as BellSouth was the only provider of telecommunications services in Palm Beach, Florida, able to meet the Palm Beach School District's needs. Given this fact, the extension entered into between BellSouth and the Palm Beach School District cannot reasonably be classified as "voluntary." There can be no better evidence of this fact than the response the Palm Beach School District received this year when it submitted a new Form 470 to govern future services. BellSouth was the only provider who responded.

In short, the limitation contained in Section 54.511(d)(1) can only reasonably be construed to mean that 1) where a school district is no longer subject to an existing contract, *i.e.*, when the initial and any renewal terms contained in the body of the contract have expired, and 2) there are meaningful options from which the school district can select service, then a competitive bidding process must be undertaken. Neither condition was present here.

3. Even if the Commission Were to Consider the Extension a "Voluntary Extension," it Would Be a Minor Modification of the Agreement Under Federal and State Law

Even if the Commission were to consider the two year renewal of the Palm Beach School District's Agreement with BellSouth a "voluntary extension," it would only constitute a "minor modification" to the Agreement under federal and state law, and thus would still be exempt from

state or local competitive bid processes. When it adopted its procedures for ordering services (set forth in Section 54.511(d)(1) of the Commission's rules), the Commission also adopted an exception to certain of those rules for "minor modifications" to existing contracts. The Commission stated "[w]e, therefore, conclude that an eligible school, library, or rural health care provider will be entitled to make minor modifications to a contract that the Schools and Libraries Corporation or the Rural Health Care Corporation previously approved for funding without completing an additional competitive bid process."[20] In determining whether the modification made to a contract is a "minor modification," the Commission stated that it will defer to state law: "we conclude that eligible schools, libraries, and rural health care providers should look to state or local procurement laws to determine whether a proposed contract modification would be considered minor and therefore exempt from state or local competitive bid processes."[21]

It is difficult to imagine a more "minor" modification to an agreement than one that merely effectuates the existing terms of the agreement as originally written. In any event, under Florida law, district school boards are allowed to contract for information technology resources "as best fits the needs of the school district as determined by the school board" without the requirement to solicit bids.[22] Since under Florida law the Palm Beach School District had no obligation to undergo a competitive bidding process prior to entering into an agreement in the first place, it logically follows that exercise of an extension option on an existing agreement would be minor under Florida law.

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20 *See Fourth Order* at 5448.

21 *See id.* at 5449.

22 *See* FLA. ADMIN. CODE 6A-1012(10) r. 2003.

The Commission further acknowledged that the "cardinal change" doctrine, a concept which was imported from federal procurement law,[23] will apply where state law is either silent or not applicable.[24] According to the Commission: "[t]he cardinal change doctrine looks at whether the modified work is essentially the same as that for which the parties contracted . . . . Ordinarily a modification falls within the scope of the original contract if potential offerors reasonably could have anticipated it under the changes clause of the contract."[25]

Here the ostensible "modified work" is not even modified -- it is precisely the same as that which was provided for under the original Agreement. Moreover, other possible bidders (of which there were none in 1996, and none in 2003), reasonably would have anticipated that the additional time could have been added to the length of the Agreement based on the Agreement's express terms, and based on standard practice (virtually every contract has a renewal term provision in it). Thus, under the cardinal change doctrine, the Palm Beach County School District's continuance of the Agreement for two years pursuant to the express terms of the Agreement constituted a "minor modification" which did not require the Palm Beach School District to comply with the Commission's competitive bid requirements in Section 54.504 of the Commission's rules.[26] Accordingly, under both Florida and federal law, there was no obligation to engage in a competitive bid processes before signing the contract continuation, and, therefore,

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23 *See GraphicData, LLC v. US*, 37 Fed. Cl. 771, 778 (1997).

24 *See Fourth Order* at 5449.

25 *See id.* at 5450.

26 *See* 47 C.F.R. § 54.504 (2002).

the Palm Beach County School District had no legal obligation to file a Form 470 before doing so.

4. It Would Be Inequitable to Deny Funding to the Palm Beach County School District for Failing to File a Form 470 for Funding Year 5

Equity requires that the *Denial Decision* be reversed, since: 1) the Palm Beach School District acted in accordance with the SLD's posted instructions; 2) the Palm Beach School District made its decision not to file a second Form 470 relative to its long term contract in reasonable reliance on SLD staff representations; and 3) the goals of the universal service regime will be undermined absent its reversal.

a. The Palm Beach School District fully complied with the Instructions Contained on the SLD's web-site

The SLD has mandated that applicants rely on no source of information other than the instructions contained on its website (the "Instructions") for guidance on E-rate program requirements: "It is the responsibility of all applicants to review our website and to follow all program requirements. The only guidance applicants are to rely on are included in that website."[27] This is precisely what the Palm Beach School District did.

The competitive bid requirements state that an entity seeking universal service funded discounts on purchased telecommunications services must submit Form 470 to the SLD, listing the details of the entity's needs.[28] The SLD then posts this information on the SLD's web-site.[29] After a four week waiting period, during which time potential service providers have the

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27 *See Denial Decision* at 2.

28 *See* 47 C.F.R. § 54.504(b) (2002).

29 *See id.*

opportunity to contact the entity to bid for the contract, the entity may then submit Form 471, requesting the applicable discount from the SLD.[30] With respect to the Exemption, the Instructions state:

> "Tip 3. Only File Form 470 ONCE for Each New Contract, and File Form 470 Annually for Tariffed and Month-to-Month Services. Multi-year contracts require only one Form 470 to be filed when procurement begins. Each 470 has a unique number, to which you will refer in your annual Form 471 applications."[31]
>
> "Note that once an applicant has signed a multi-year contract in a prior funding year pursuant to a posted form Form 470, ***it need not submit a new Form 470*** to be eligible to apply for discounts on the services provided under that multi-year contract for future years."[32]

The Instructions make no mention of the "voluntary extension" limitation on the Exemption. In the *Denial Decision*, the SLD turned this fact on its head, stating that "these instructions do not indicate that if an applicant has decided to extend a current contract that no Form 470 is required."[33] But the Instructions do not indicate that a new Form 470 is required if an applicant seeks to extend a current contract either. The *Denial Decision* apparently stands for the proposition (one which cannot be reconciled with either law or reason), that where the SLD's Instructions are silent on an issue, applicants for E-rate subsidies should construe such silence as an affirmative proscription. The SLD's reasoning must fail.

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30 *See id.*

31 *See* Tips for Completing Your Form 470, <http://www.sl.universalservice.org/reference/470Tips_Yr4.asp> (last visited June 13, 2003).

32 *See* E-Rate Discounts for Schools and Libraries, <http://www.sl.universalservice.org/data/pdf/ERATE_DISCOUNTS_FOR_SCHOOLS_AND_LIBRARIES.pdf> (last visited June 13, 2003) (emphasis added).

33 *See Denial Decision* at 2.

Even more egregious is the SLD's citation and reliance on the Code of Federal Regulations ("CFR") in the very next paragraph after it ordered applicants to rely on no source of information other than its Instructions.[34] The SLD cannot on the one hand lawfully instruct applicants to rely on no source of information other than the Instructions on its web-site, while on the other hand "fall back" on federal regulations when those Instructions prove inadequate.

The Palm Beach School District complied in every respect with the letter of the Instructions. The *Denial Decision* must be reversed.

b. The Palm Beach School District reasonably (and ultimately detrimentally) relied on SLD staff representations

There can be no better evidence of the Palm Beach School District's reasonable reliance on the instructions of SLD staff than the fact that the Palm Beach School District did not file a second Form 470 for the additional two years on the Agreement, when it had more than ample opportunity to do so (and would have done so had SLD staff not instructed it otherwise).

To prove detrimental reliance, the School District must demonstrate that it relied to its detriment upon the misstatements of SLD staff,[35] which is certainly the case here (though the only reason that its reliance proved "detrimental" is because of the poorly reasoned *Denial Decision*).

SLD staff first contacted the Palm Beach School District on March 16, 2001. On that date, SLD staff proposed three alternative courses of action that the Palm Beach School District could undertake to secure funding under the remaining term of the Agreement (*i.e.* for periods

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34 *See id.*

35 *See Paley v. U.S.*, 1998 U.S. Dist. LEXIS (1998) at 11. *See also, Loudermilk v. Barnhart*, 290 F.3d 1265 (11th Cir. 2002).

not covered under previously filed Form 471s), one of which was "[i]f you have options to renew on your existing contract you may exercise those options now and in [sic] then fax a signed copy of your contract to me."[36] This is the alternative that the Palm Beach School District chose.

March 16, 2001 is more than a year before the beginning of Funding Year 5 (in July 2002). More to the point, a Form 470 for Funding Year Five could have been filed as late as December 2001. Had the SLD instructed the Palm Beach School District to submit a new Form 470 in March of 2001 (or, conversely, had it not affirmatively instructed the School District that it did not have to file another Form 470), the School District would simply have filed the Form 470 so as to ensure that its subsidies for Funding Year 5 were secure. No assertion to the contrary can be maintained. Form 470 is not particularly onerous. The only reason the Palm Beach School District did not file a new Form 470 is because it was instructed not to. It would be inequitable to penalize the Palm Beach School District for its reasonable reliance on SLD staff instructions. The inequity is even more significant given the ongoing and pervasive nature of the contact between the Palm Beach School District and SLD staff, who spoke routinely over the course of more than a year, without the SLD ever having raised the issue of a new Form 470 until the decision to deny funding was made.

c. The *Denial Decision* Undermines Congress' Universal Service Goals

Congress' intent in enacting Section 254 of the Telecommunications Act of 1996,[37] was to ensure that all Americans have access to high quality and low cost telecommunications services. The Commission has noted that Congress intended to ensure that "eligible schools and

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[36] *See* e-mail correspondence from Jeremy Tucker to Fred Ferguson, March 16, 2002.

[37] *See* 47 U.S.C. § 254 (2001).

libraries have affordable access to modern telecommunications and information services that will enable them to provide educational services to all parts of the nation."[38] By denying funding to the Palm Beach School District on what are at best hyper-technical grounds, the SLD is undermining these goals.

The Palm Beach School District is in dire need of the universal service support it seeks, and to which it is properly entitled. Its budget was developed in anticipation of this funding. If its funding were denied, it would suffer irreparable and immediate harm, as it would lack the money to fund many of its programs, and to purchase the supplies it requires. In short, Congress' very purpose in adopting its universal service mechanisms will be subverted.

5. Special Circumstances Warrant a Waiver

Should the Bureau find that the Palm Beach School District technically should have filed a second Form 470 relative to the additional two years on the Agreement under Section 54.504 of the Commission's rules,[39] the Palm Beach School District respectfully requests a waiver of that requirement.

A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.[40] Waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the

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38 *See Report and Order* at 9063.

39 *See* 47 C.F.R. § 54.504(b) (2002).

40 *See Northeast Cellular Telephone Company v. Federal Communications Commission,* 897 F.2d 1164, 1166 (D.C. Cir. 1990).

rule.[41] When considering waiver requests, the Commission should take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[42] Not only are special circumstances present in this case, but it is also difficult to imagine a waiver request involving greater hardship, equity, and overall policy concerns than are present here.

The special circumstances have already been discussed at length above. The Palm Beach School District reasonably relied on the instructions and guidance it received from SLD staff to its detriment. The hardship, equity, and overall policy concerns are even more pronounced. An entire school district's funding is at issue here. In the absence of waiver, the Palm Beach School District will lack the funding necessary to maintain certain of its programs, and to purchase books and supplies for the school children of Palm Beach County. These are catastrophic consequences, especially when considered in view of the fact that the Palm Beach School District is properly entitled to the funding.

Finally, it should be noted that grant of waiver will have little, if any, precedential effect on a going-forward basis, and thus it is appropriate to consider the equities of this specific situation. The Exemption governs contracts entered into prior to July 10, 1997 (six years ago). Because contracts involve the allocation of risk between parties, few contracts, especially in the telecommunications sector, have terms that extend much beyond six years. Indeed, the Agreement, which has one of the lengthier terms for telecommunications services contracts,

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41 *See id.*

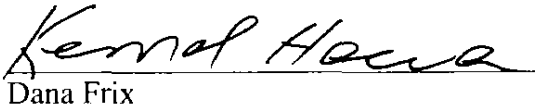
42 *See WAIT Radio v. Federal Communications Commission*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

only has a total term of seven years. Thus, the Exemption will be rendered obsolete in the near future.

REQUEST FOR RELIEF

For the foregoing reasons, the Palm Beach School District respectfully requests that the Bureau grant this Request for Review and reverse the SLD's *Denial Decision*, or in the alternative, grant the requested waiver.

Respectfully submitted,



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June 16, 2003

EXHIBIT LIST

Exhibit 1 - Volume and Term Agreement between BellSouth Telecommunications, Inc., and The School District of Palm Beach County; Master Services Agreement; Addendum

Exhibit 2 - E-mail from Jeremy Tucker of the Client Services Bureau/Problem Resolution of the Schools and Libraries Division to Fred Ferguson of the Palm Beach County School District, March 16, 2001

Exhibit 3 - Administrative Decision on Appeal-Funding Year 2002-2003, Schools and Libraries Division, April 15, 2002